cipal case would have been decided differently and in accord with the practice under the earlier bankruptcy act, when the "trust fund" theory was in vogue.[16]

LIABILITY FOR WORDS IMPUTING CRIME. — Are spoken words, which charge a plaintiff with specific acts erroneously alleged to be criminal, actionable *per se?* A recent New York decision suggests this question. The defendant charged the plaintiff with riding on a free pass, and intimated that the act was subject to investigation by the grand jury, although in fact it was not a crime. The court held that the imputation was "libelous *per se.*" *Dooley* v. *Press Publishing Co.*, 170 N. Y. App. Div. 492.[1]

Spoken words imputing crime may be allegations of fact,[2] or they may draw conclusions of law.[3] Are they slanderous *per se* if they do both, and the allegations of fact negative the conclusions of law? Surely not if the hearers may be assumed to know the law, for then the words do not impute crime. This seems to be the tacit assumption of all the cases.[4] But if the hearers do not know the law, and wrongly believe that

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v. Knight, 135 Ga. 60, 68 S. E. 834; Cox *v.* Dixie, 48 Wash. 264, 93 Pac. 523. *Contra*, Haskell *v.* Worthington, 94 Mo. 560, 7 S. W. 481.

[16] See note 8. And to same effect under the present act, see *In re* Crystal Springs Bottling Co., 96 Fed. 945. The right to collect unpaid subscriptions, where there is no agreement that they shall not be paid in full, passes to the trustee in bankruptcy. See LOVELAND, BANKRUPTCY, 4 ed., § 392.

[1] The principal case was one of libel, but the New York courts frequently estimate libel with the aid of the common standards for words slanderous *per se.* The New York rule in libel does not differ essentially from that in other jurisdictions. Gates *v.* N. Y. Recorder Co., 155 N. Y. 228, 49 N. E. 769. Confusion has been caused, however, by failure to distinguish sharply enough between the definitions of libel and of slander. Moore *v.* Francis, 121 N. Y. 199, 204, 23 N. E. 1127, 1128. The confusion is explained and the New York rule well stated in Cady *v.* Brooklyn Union Pub. Co., 51 N. Y. Supp. 198: "The rule is of familiar statement, that not only do oral words which amount to slander *per se* constitute libel *per se* if written, but that in addition any written words soever which hold one up to disgrace, hatred, ridicule or contempt, are libelous *per se*, however much they may fall short of charging a criminal offense, or of amounting in any other respect to slander if only spoken."

[2] As, "thou hast killed thy master's cook," a sufficient charge of murder. Cooper *v.* Smith, Cro. Jac. 423.

[3] As, "you are an incendiary and a murderer." Noeninger *v.* Vogt, 88 Mo. 589.

[4] The most common type of case arises from the application to the plaintiff of a criminal epithet, supplemented by words which show the epithet inapplicable, as "thou art a thievish knave for thou hast stolen my wood," growing wood not being subject to larceny. Robins *v.* Hildredon, Cro. Jac. 1, 65. Minors *v.* Leeford, Cro. Jac. 1, 114 (*semble*); Christie *v.* Cowell, 1 Peake 4; Thomson *v.* Bernard, 1 Camp. 47; Lemon *v.* Simmons, 57 L. J. Q. B. 260; Jones *v.* Bush, 131 Ga. 421, 62 S. E. 279; Fawsett *v.* Clark, 48 Md. 494; Brown *v.* Myers, 40 Oh. St. 99; Egan *v.* Semrad, 113 Wis. 84, 88 N. W. 906; McCaleb *v.* Smith, 22 Ia. 242. Similar decisions are found in cases where it was apparent that the plaintiff could not have committed the crime imputed by the words in their ordinary sense. Snag *v.* Gee, 4 Rep. 16, and Williams *v.* Stott, 1 C. & M. 675, 684, as explained by Parke, B., in Heming *v.* Power, 10 M. & W. 564, 569; Jackson *v.* Adams, 2 Bing. N. C. 402. See Carter *v.* Andrews, 33 Mass. 1; Williams *v.* Miner, 18 Conn. 464, 473; and *cf.* Stewart *v.* Howe, 17 Ill. 71, where it was held slander *per se* to accuse a child under ten years old of larceny, though a child of that age was legally incapable of the crime. On the basis of this last case Odgers states the modern rule to be: "if the words would convey an imputation of felony to the minds of ordinary

the conclusion of law is justified by the allegation of fact, are the words slanderous *per se?* The cases afford no answer. The solution of the problem must depend on whether the gist of the defendant's offense is putting the plaintiff in jeopardy of criminal prosecution or degrading him in the eyes of his fellows.[5] There is good authority for either contention. Baron Parke took the former position: "The ground of the matter being actionable is that a charge is made, which, if it were true, would endanger the plaintiff in point of law." [6] Yet it is actionable *per se* to charge the plaintiff with having suffered punishment for crime,[7] or with having committed a crime for which prosecution is now barred, either by the statute of limitations[8] or because the criminal statute has been repealed.[9] And the imputation may be so general as scarcely to endanger the plaintiff.[10] The prevailing modern view, accordingly, seems to take the latter position, and agree with the *dictum* of Lord Holt, that the gravamen of the offense is the effect on the plaintiff's reputation.[11] But if this is the right view it is difficult to explain the narrowness of the rule.[12] An imputation of an intent to commit crime seems equally damnatory, yet it is not actionable *per se.*[13] So also the plaintiff must allege special damage if he is called rogue, rascal, cheat, or swindler.[14]

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hearers unversed in legal technicalities, an action lies." ODGERS, LAW OF LIBEL AND SLANDER, 5 ed., 50. It is submitted that the case does not justify so broad a conclusion, since it did not appear that the hearers were aware of the plaintiff's age. As in Carter *v.* Andrews and Williams *v.* Miner (*supra*), it may well have been a lack of knowledge of the *facts*, not of the *law*, on the part of the hearers, which made the defendant's words imputative of actual crime.

[5] See 6 AM. L. REV. 593, 594.

[6] Heming *v.* Power, 10 M. & W. 564, 569.

[7] As, "Thou wast in Launceston gaol for coming . . . you were burnt in the hand for it." Gainford *v.* Tuke, Cro. Jac. 1, 536; Boston *v.* Tatam, Cro. Jac. 1, 623; Fowler *v.* Dowdney, 2 M. & Rob. 119; Krebs *v.* Oliver, 78 Mass. 239; Smith *v.* Stewart, 5 Pa. St. 372. See ODGERS, LAW OF LIBEL AND SLANDER, 5 ed., 45.

[8] Webb *v.* Fitch, 1 Root (Conn.) 544. See Van Ankin *v.* Westfall, 14 Johns. (N. Y.) 233.

[9] French *v.* Creath, 1 Ill. 31.

[10] As, "if you had your desserts you had been hanged before now." Donne's Case, Cro. Eliz. 62. Jenkinson *v.* Mayne, Cro. Eliz. 384; Curtis *v.* Curtis, 10 Bing. 477; Francis *v.* Roose, 3 M. & W. 191; Tempest *v.* Chambers, 1 Stark 67; Webb *v.* Beavan, 11 Q. B. D. 609. See ODGERS, LAW OF LIBEL AND SLANDER, 5 ed., 40.

[11] "And Holt, Chief Justice, said, it was not worth while to be learned on that subject; but said, that for his part, wherever words tended to take away a man's reputation he would encourage actions for them, because so doing would contribute much to the preservation of the peace." Baker *v.* Pierce, 6 Modern 23. "Where the words spoken do tend to the infamy, discredit or disgrace of the party, there the words shall be actionable." Smale *v.* Hammon, Bulstrode 40. So in ODGERS, LAW OF LIBEL AND SLANDER, 5 ed., 2: "In all these cases the words are said to be actionable *per se*, because on the face of them they clearly must have injured the plaintiff's reputation." Shipp *v.* M'Craw, 3 Murphy (N. C.) 463; Krebs *v.* Oliver, 78 Mass. 239; Smith *v.* Stewart, 5 Pa. St. 372; *cf.* Klumph *v.* Dunn, 66 Pa. St. 141, 144. See STARKIE, LAW OF SLANDER AND LIBEL, 3 ed., 99.

[12] As an example of the reasoning to which recourse is had, see Shipp *v.* M'Craw, 3 Murphy (N. C.) 463, 466: "The *gravamen* in an action for slander is *social degradation.* The risk of punishment, and the rule to test the question whether the words be or be not actionable, to wit: does the charge impute an infamous crime, is resorted to, to ascertain the fact whether it be a social degradation, and not whether the risk of punishment be incurred. . . . No other degradation will give an action, for no other degradation is a social loss."

[13] Fanning *v.* Chace, 17 R. I. 588; 22 Atl. 275; Dickey *v.* Andros 32 Vt. 55; Bays *v.* Hunt, 60 Ia. 251, 14 N. W. 785 Mitchell *v.* Sharon, 59 Fed. 980.

[14] See 6 AM. L. REV. 593, 595; ODGERS, LAW OF LIBEL AND SLANDER, 5 ed., 49.

The rigid and artificial classification by which no words are slanderous *per se* unless they impute crime, certain contagious diseases, or disrepute in one's business, office, or profession must have an historical rather than a logical basis. Shame was keenly felt among the early English, and in the manorial courts, where defamation was first dealt with, almost everything militating against personal honor was cognizable.[15] With the decay of the local courts defamation was taken over by the ecclesiastical courts. In 1295 the king's court declared solemnly that it would not entertain pleas of defamation.[16] The jurisdiction thus disclaimed was not easily acquired, and the resulting struggle was probably responsible for the artificiality of the rules of the modern action for slander.[17] The suggestion has been made[18] that the king's courts acquired jurisdiction of words imputing crime on the ground that the offense charged drew after it as an incident the right to investigate the charge and to compensate the person injured if it were false. Similar reasons, it is said, can be found for the assumption of jurisdiction over the other two classes of words which became defamatory *per se*. The leper, for instance, was subject to the writ *de leproso amovendo* which determined his legal existence, and the plague-stricken were legally removable to the pest-house.[19] Similarly the earlier cases of words touching a man in his office or business all relate directly to the administration of justice, as the defamation of a judge, a justice of the peace, or an attorney in his office; and so also to call a merchant a bankrupt was to subject him to the statute of bankruptcy. For some such reasons these narrow classes of words, along with words causing special damage, came to be regarded as "imputations strictly temporal," while all other opprobrious terms were merely "spiritual" and remained legitimately within the jurisdiction of the courts Christian.[20]

If it is true that the common law courts took jurisdiction over words imputing crime on the basis of their jurisdiction over the crime charged, it would seem that the words must impute acts which are in fact criminal, irrespective of the allegations of the defendant or the opinions of the hearers as to the law. If a modern court were squarely faced with the

[15] So it was slander to call one "a false man, full of frauds, and a picker of quarrels." See F. Carr, in 18 L. Q. Rev. 255, 266; F. W. Maitland, in 2 Green Bag 4.

[16] Rot. Parl. 1, 133. See 2 Pollock and Maitland, History of English Law, 535.

[17] See V. V. Veeder in 3 Select Essays in Anglo-American Legal History, 446, 458.

[18] See 6 Am. L. Rev. 593, 605.

[19] The inclusion of syphilis in this assumption of jurisdiction over contagious disorders is not so easily explained. It did not appear in England until late in the 15th century, however, and is known to have resembled a form of leprosy then common.

[20] See Palmer *v.* Thorpe, 2 Coke's Rep. 315. "Touching defamations determinable in the ecclesiastical court, it was resolved, that such defamation ought to have three incidents: 1. That it concerns matter merely spiritual and determinable in the ecclesiastical court, as for calling him 'heretic, schismatic, adulterer, fornicator, etc.' 2. It ought to concern matter spiritual only; for if such matter touches or concerns anything determinable at the common law, the ecclesiastical judge shall not have cognizance of it. 3. Although such defamation is merely spiritual . . . yet he who is defamed cannot sue there for amends or damages, but the suit ought to be only for the punishment of the sin, *pro salute animae*." Even after the jurisdiction of the ecclesiastical courts was crippled, a jurisdiction remained over words imputing an offense punishable in the ecclesiastical courts. Harris *v.* Butler, cited in the note to Crompton *v.* Buller, 1 Haggard Cons. 463.

question, however, it is not impossible that the decision would be made on the basis of the obloquy rather than the jeopardy brought upon the plaintiff.[21] Although such a decision would represent a natural tendency to approximate the law of slander to the more liberal rules in libel,[22] it would amount to no more than a patch on an artificial, illogical structure in the law for which the only real remedy is legislation.

ÆSTHETICS AND THE FOURTEENTH AMENDMENT. — The increasing complexity of modern conditions of life has induced a growing tendency, in the interest of public welfare, to restrict the use of private property. It is but natural that this has resulted in attempts to regulate the unsightly use of property — legislation inspired solely by æsthetic motives. The more usual forms are limitations on the erection of buildings, or, even more common, a prohibition of that most typical feature of American scenery, the billboard. There can be little doubt that such regulation, if reasonably exercised, is highly expedient. But such legislation has met with great difficulty from the Fourteenth Amendment. One might suppose that it would clearly fall within the scope of the police power as it is so frequently broadly laid down.[1] Nevertheless, the decisions are practically unanimous in holding a regulation of the use of private property for æsthetic reasons alone beyond the police power.[2] It is, there-

[21] See Klumph *v.* Dunn, 66 Pa. St. 141.

[22] The desirability of a broader rule in slander was expressed by Mr. Justice Holmes in Rutherford *v.* Paddock, 180 Mass. 289, 292, 62 N. E. 381, 382. The opposite tendency is well illustrated by Jones *v.* Jones, [1916] 1 K. B. 350, 358: "The law of slander is an artificial law, resting on very artificial distinctions and refinements, and all the court can do is to apply the law to those cases in which hereto it has been held applicable."

[1] "It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." Justice Holmes in Noble *v.* Haskell, 219 U. S. 104, 111. "It may be said to be the right of the State to prescribe regulations for the good order, peace, health, protection, comfort, convenience and morals of the community." Champer *v.* City of Greencastle, 138 Ind. 339, 351, 35 N. E. 14, 18. "It has for its object the improvement of social and economic conditions affecting the community at large and collectively with a view to bring about 'the greatest good of the greatest number.' Courts have consistently and wisely declined to set any fixed limitations upon subjects calling for the exercise of this power. It is elastic and is exercised from time to time as varying social conditions demand correction." People *v.* Brazee, 149 N. W. 1053, 1054 (Mich.). Coupled with such judicial utterances the admission of Justice Brown in Holden *v.* Hardy, 169 U. S. 366, 385, that "This court has not failed to recognize that the law is, to a certain extent, a progressive science," offers hope for a more liberal treatment of this question in the future.

[2] In the following cases billboard ordinances were declared unconstitutional: Varney & Green *v.* Williams, 155 Cal. 318, 100 Pac. 867; Curran Bill Posting Co. *v.* Denver, 47 Colo. 221, 107 Pac. 261; Haller Sign Works *v.* The Physical Culture Training School, 249 Ill. 436, 94 N. E. 920; Haskell *v.* Howard, 109 N. E. 992 (Ill.); Crawford *v.* City of Topeka, 61 Kan. 756; Kansas City Gunning Advertising Co. *v.* Kansas City, 240 Mo. 679, 144 S. W. 1099; Passaic *v.* Paterson Bill Posting Co., 72 N. J. L. 285, 62 Atl. 267; People *v.* Green, 85 App. Div. (N. Y.) 400; People *v.* Murphy, 195 N. Y. 126, 88 N. E. 17; State *v.* Whitlock, 149 N. C. 542, 63 S. E. 123; State *v.* Staples, 157 N. C. 637, 73 S. E. 112; Bryan *v.* City of Chester, 212 Pa. 259, 61 Atl. 894.

In the following cases æsthetic building regulations were held invalid: People *v.*